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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/511,780	02/23/2000	Johannes Baensch	8265-305	3549

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WINSTON & STRAWN
PATENT DEPARTMENT
1400 L STREET, N.W.
WASHINGTON, DC 20005-3502

EXAMINER

MADSEN, ROBERT A

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 08/01/2002

18

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/511,780

Applicant(s)

BAENSCH ET AL.

Examiner

Robert Madsen

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 20 May 2002.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-36 and 38-46 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-36 and 38-46 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s) _____
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ 6) ☐ Other:

DETAILED ACTION

Continued Prosecution Application

The request filed on May 20, 2002 for a Continued Prosecution Application (CPA) under 37 CFR 1.53(d) based on parent Application No. 09/511,780 is acceptable and a CPA has been established. The Preliminary Amendment filed May 20, 2002 has been entered. Accordingly, claim 37 has been cancelled and claims 39-46 have been added. Claims 26-36,38-46 remain pending in the application. An action on the CPA follows.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 26,29,30,32-35, 38, and 46 are rejected under 35 U.S.C. 103(a) as being unpatentable over Player et al. (US 4762725).

Regarding claims 26,30,32,33,35 and 38, Player et al. teach a cream comprising/consisting essentially of

10-20% milk derivatives such as skimmed milk powder as recited in claim 30 (e.g. 10% skim milk solids in Example 1, skim milk + buttermilk solids of 10% in Example 2, Column 7, lines 15-18,Column 3, lines 23-35),

8-30% sugars (e.g. 8% in Example 2 and 10% in Example 2, Column 7, lines 51-53), 10-60% fermented dairy product ((e.g. 27% cheese powders in Examples 1 and 31% Example 2),

0.01%-25% of sour cream with 36% fat (5% of sour cream 36 in Example 2) which is a sufficient amount to provide desired organoleptic or smoothness as recited in claim 32,

0.01-35% texturing agent such as maltodextrin as recited in claim 33(example 2 at 7%), and

0.01-20% flavor (e.g. 1.75% jalapeno powder in Example 2), and the cream being disposed on a biscuit (i.e. crackers, sandwich creams, etc in Column 13, lines 29-38).

Player et al. teach salt is added, as recited in claims 29 and 35, *along with* the cheese powders (as shown in the Cheese Powder Tables 1 and 2) and further recognize that adding any particular level of salt, via dairy ingredients, may be advantageous or disadvantageous, depending on the desired flavor (column 7, lines 12-15). Player et al. are silent in teaching a particular quantity of salt, such as 0.01% to 0.5%.

However, to add any particular level of salt would have been an obvious result effective variable of the type of flavor desired since adding salt was perceived as advantageous or disadvantageous depending on the desired flavor for the biscuit creams.

Regarding claims 29, Player et al. teach a molten fat from 10-45% as recited in claim 29 (Example 2, Column 3, lines 22-30)

Regarding claim 34, Player et al. teach cocoa powder (Column 9, lines 40-47).

Regarding claim 46, Player et al. teach two layers of biscuit (i.e. sandwiches, confectionery centers, etc Column 13, lines 28-38).

Claims 27 and 44 are rejected under 35 U.S.C. 103(a) as being unpatentable over Player et al. (US 4762725) as applied to claims 26,29,30,32-35, 38, and 46 above, further in view of Lauro (EP 0666031A2).

Player et al. teach a shelf stable cream based filling, which may be cocoa flavored (Column 9, lines 40-47), for bakery products (Abstract) having low moisture content (i.e. low water activity –see Examples), but is silent in teaching having living bacteria. Lauro also teaches a stable cream based-cocoa flavored filling for bakery products with a low water activity and with living bacteria. Whereas Player et al. teach fermented dairy products such as cheese powder, Lauro teaches yogurt powder with active cultures. Lauro teaches adding fermented milk powders with live active cultures, starting at 10^7 to 10^{11} per gram of filling, as recited in claim 27, is preferred since they have a high nutritional contribution. In one example Lauro begins with a bacteria concentration of 10^9 per gram of filling and after four months has 8×10^5 per gram remaining in the composition (Abstract, Page 2, lines 1-32, Page -3, lines 14-15, Example).

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Therefore it would have been obvious to include active cultures between 10^4 to 10^{11} per gram in the composition of Player et al. since it was recognized in the art that fermented milk products having live active cultures contribute a nutritional value to a biscuit filling and one would have been substituting one known fermented milk product for another in a biscuit filling composition. It would have been further obvious, that by doing so, one would have 10^6 per gram after 45 days of storage, since Lauro teaches a filling that begins with a concentration of 10^9 per gram results in 8×10^5 per gram after four months (120 days). One would expect that after 45 days, or only a third of the time period taught by Lauro, at least 10^6 per gram would remain. Furthermore, Lauro teaches starting concentrations greater than 10^9 per gram (up to 10^{11} per gram), and one would expect to have more than 10^6 after 45 days at greater starting concentrations.

Claims 26,31-34,39-41,43,46 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rosen (US 5800855) in view of Cajigas (US 5145697).

Regarding claims 26,31-34, 38, 46 Rosen teaches an frozen cheesecake ice cream which is aerated as recited in claim 36 (Column 4, lines 48-55) may be used to make an ice cream sandwich, or having 2 layers of biscuits as recited in claim 46, (Abstract, Column 5, lines 1-6) comprising/consisting essentially of:

10-20% milk derivatives such as condensed milk as recited in claim 30 (e.g. 10.3% in Example 1, column 2, lines 46-49),

8-30% sugars(e.g. 21.5% in Example 1, Column 5, lines 40-55),

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10-60% fermented dairy product such as cream cheese as recited in claim 31 (e.g. 13% cream cheese in Example 1),

0.01%-25% of cream with 40% fat (24.5% in Example 1, column 2, lines 39-41) which is a sufficient amount to provide desired organoleptic or smoothness as recited in claim 32, and

0.01-20% flavor, such as vanilla as recited in claim 34 (e.g. 0.1% in Example 1 or up to 3% in column 4, lines 39-47),

Additionally, Rosen teaches adding a stabilizing system, which comprises texturing agents such as carob bean gum, gaur gum or carrageenan as well as salt. Rosen teaches the texturizing agents are added for viscosity and the salt increases surface tension for stability (Column 3, lines 17-25, Column 3, line 55 to Column 4, line 10). Rosen teaches adding the stabilizing system in a mixture (e.g. 0.5% in Example 1), but is silent in teaching a level of texturing agent at 0.01-35% or salt at 0.01-0.5%.

Cajigas are relied on as further evidence that carob bean gum, gaur gum or carrageenan are texturizing agents (See Column 5, line 2 to Column 6, line 53).

However, to add any particular level of either texturizing agent or salt would have been an obvious result effective variable of the desired viscosity or surface tension to maintain a stable product since Rosen teaches texturizing agents are added for viscosity and the salt increases surface tension for stability.

Regarding claim 33, Rosen teaches texturizing agents such as carob bean gum, gaur gum or carrageenan in a frozen cultured dairy cream, but is silent in teaching maltodextrins. Cajigas is relied on as evidence of the art recognized equivalence of

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maltodextrins and carob bean gum, gaur gum or carrageenan in the frozen cultured dairy cream art (Column 5, line 2 Column 6, line 53). Therefore, it would have been obvious to modify Rosen and use maltodextrin since one would have been substituting one type of texturizing agent for another for the same purpose.

Regarding claims 39, 41,40, Rosen teaches fruit pieces including lemon rind at 0.1-3% (Column 4, lines 38-67).

Regarding claim 43, Rosen teaches the cream should be aerated with air to achieve an overrun of 50-70% (Column 4, lines 48-55), therefore to add any particular volume of inert gas to a any particular weight of cream would have been an obvious result variable of the volume of cream that is to be aerated.

Claim 45 is rejected under 35 U.S.C. 103(a) as being unpatentable over Rosen (US 5800855) in view of Cajigas (US 5145697) and Nelham (US 4145449).

Rosen teaches an frozen cheesecake ice, which may be used to make an ice cream sandwich (Abstract, Column 5, lines 1-6), *having the composition recited in claim 26* for the reasons cited above in the rejection of claims 26. However, Rosen is silent in teaching a hermetically sealed plastic sachet. Nelham is relied on as evidence of the conventionality of packaging ice cream sandwiches in hermetically sealed plastic coated sachets in order to maintain the ice cream separate from the sandwich, or biscuit, and prevent the biscuit from getting soggy (Column 1, line 30 to Column 2, line 32). Therefore, it would have been obvious to package the ice cream sandwich in a hermetically sealed package since this would prevent the biscuit from getting soggy.

Claims 26-32,35,38, 42,46 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kingham et al. (US 4721622) in view of Tamime et al and Player et al. (US 4762725).

Regarding claims 26-28,30-32,35, 38,42,46 Kingham et al. teaches a cream filling comprising 40% cream cheese as recited in claim 31, 20.8% double cream which would be in an amount sufficient to increase the smoothness of the mixture as recited in claim 32 since double cream is known to at least 36% fat, 3.12% of a texturizing agent (i.e. maize starch), 0.11% of an aromatic product (i.e. spices) (See example 1). In another example, Kingham et al. teaches uses yogurt as the fermented dairy product, which are known in the art to be between 10^4 to 10^{11} per gram as recited in claim 27 (as evident by Tamime et al. page 393), and includes a sugar. Kingham et al. teaches the creams have a water activity of anywhere from 0.2 to 0.99, as recited in claim 28, and that they are in a biscuit, or dough based product, as recited in claim 26,38, and 46. Kingham et al. teach 20.8% milk, which is an ingredient *comprising or consisting essentially of* at least 18.3% unskimmed powdered milk as recited in claim 30 (i.e. whole milk is 88% moisture plus the composition found in unskimmed powdered milk).

Although Kingham et al. teach the creams may be either sweet or savory (Column 4, lines 32-67), Kingham et al. are silent in teaching up 0.01 to 0.5% salt as recited in claims 26,35 and 38 and 8 to 30% sugar as recited in claims 26 and 38.

However, sugar and salt are conventional ingredients in the biscuit filling art. Kingham et al. these are well known additives in the biscuit cream filling art. For example Player et al. is relied on as evidence of the conventionality of providing 8-30%

sugar in a fermented milk containing biscuit filling (e.g. 21.5% in Example 1, Column 5, lines 40-55), as well as salt (as shown in the Cheese Powder Tables 1 and 2). Player et al. further teach that adding any particular level of salt may be advantageous or disadvantageous, depending on the desired flavor (column 7, lines 12-15).

Therefore, it would have been obvious to add 8-30% sugar to the filling of Kingham et al. since Kingham et al. teaches sweet biscuit fillings this is a conventional level of sugar used in sweet biscuit fillings containing a fermented dairy product. Furthermore, to add any particular level of salt would have been an obvious result effective variable of the type of flavor desired since adding salt was perceived as advantageous or disadvantageous depending on the desired flavor for the biscuit creams.

Response to Arguments

Applicant's arguments with respect to the claims have been considered but are moot in view of the new ground(s) of rejection.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (703)305-0068. The examiner can normally be reached on 7:00AM-3:30PM M-F.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703)308-3959. The fax phone numbers


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for the organization where this application or proceeding is assigned are (703)872-9310 for regular communications and (703)872-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0061.

Robert Madsen
Examiner
Art Unit 1761
July 29, 2002


MILTON I. CANO
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 1700